

Supreme Court
FILED

APR 15 1977

MICHAEL RODAK JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. **76-1432**

STANDARD OIL COMPANY OF CALIFORNIA, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

**PETITION OF STANDARD OIL COMPANY OF
CALIFORNIA FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

LEE LOEVINGER

MARTIN MICHAELSON

JOSEPH C. BELL

815 Connecticut Ave., N.W.

Washington, D.C. 20006

(202) 331-4500

Attorneys for Petitioner

Standard Oil Company of

California

Of Counsel:

HOGAN & HARTSON

815 Connecticut Ave., N.W.

Washington, D.C. 20006

April 15, 1977

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	3
Reasons for Granting the Writ:	
1. Contrary to This Court's Decisions, the Circuit Court Has Removed Any Authority in the Courts To Modify Administrative Subpoenas for Burden or Relevance or To Protect Confidentiality	8
2. The Decision Below Alters the Established Standard of Review of District Court Decisions Respecting Administrative Subpoenas by Allowing the Reviewing Court To Reverse the District Court on Fact Issues Without Any Finding of Abuse of Discretion or Clear Error	10
3. The Circuit Court Decision Eliminates Any Authority in the District Court To Limit the Burden of Administrative Subpoenas Resulting from Duplicative Investigations by Sister Federal Agencies	15
4. The Decision of the Court Below to the Extent It Determines the Issue of Collateral Estoppel Resolves an Important Point of Law in Conflict with Decisions of This Court and Other Circuits.	17
Conclusion	18

CITATIONS

CASES:

<i>Application of Consumer's Union of United States, Inc.</i> , 27 F.R.D. 251 (S.D.N.Y. 1961)	15
<i>Area Rate Proceeding (Southern Louisiana)</i> , 40 FPC 530 (1968), <i>modified on rehearing</i> , 41 FPC 301 (1969), <i>aff'd sub nom. Austral Oil Co. v. FPC</i> , 428 F.2d 407 (5th Cir.), <i>cert. denied</i> , 400 U.S. 950 (1970), <i>aff'd per curiam</i> , 444 F.2d 125 (5th Cir. 1970)	4

	Page
<i>Area Rate Proceeding Offshore Southern Louisiana</i>	46
FPC 84 (1971), <i>aff'd sub nom. Placid Oil Co. v. FPC</i> , 483 F.2d 880 (5th Cir. 1973), <i>aff'd sub. nom. Mobil Oil Corp. v. FPC</i> , 417 U.S. 283 (1974)	5
<i>Chapman v. Maren Elwood College</i> , 225 F.2d 230 (9th Cir. 1954)	9
<i>FPC v. Transcontinental Gas Pipeline Corp.</i> , 423 U.S. 326 (1976)	10
<i>FTC v. Green</i> , 252 F. Supp. 153 (S.D.N.Y. 1966)	11, 13
<i>FTC v. Lonning</i> , 539 F.2d 202 (D.C. Cir. 1976)	10
<i>George H. Lee Co. v. FTC</i> , 113 F.2d 583 (8th Cir. 1940)	17
<i>Hellenic Lines, Ltd. v. Federal Maritime Bd.</i> , 295 F.2d 138 (D.C. Cir. 1961)	11
<i>Montship Lines Ltd. v. Federal Maritime Bd.</i> , 295 F. 2d 147 (D.C. Cir. 1961)	11, 13
<i>NLRB v. Pipefitters</i> , 45 U.S.L.W. 4144 (Feb. 22, 1977)	10
<i>Oklahoma Press Pub. Co. v. Walling</i> , 327 U.S. 186 (1946)	8, 9
<i>S & E Contractors, Inc. v. U.S.</i> , 406 U.S. 1 (1972)	16
<i>Safir v. Gibson</i> , 423 F.2d 137 (2d Cir. 1970), <i>cert. denied</i> , 400 U.S. 942 (1970)	17
<i>See v. Seattle</i> , 387 U.S. 541 (1967)	9
<i>Sunshine Coal Co. v. Adkins</i> , 310 U.S. 381 (1940)	16
<i>United States v. Morton Salt Co.</i> , 338 U.S. 632 (1950)	8
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	10
<i>United States v. Star Construction Co.</i> , 186 F.2d 666 (10th Cir. 1951)	12
<i>United States v. Utah Construction Co.</i> , 384 U.S. 394 (1966)	17
<i>United States v. Willard Tablet Co.</i> , 141 F.2d 141 (7th Cir. 1944)	17
 MISCELLANEOUS:	
<i>FPC Staff Report on National Gas Reserves Study</i> (May 1973)	5

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No.

STANDARD OIL COMPANY OF CALIFORNIA, *Petitioner*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

**PETITION OF STANDARD OIL COMPANY OF
CALIFORNIA FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Petitioner Standard Oil Company of California requests that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this consolidated proceeding on February 23, 1977.

OPINION BELOW

The *en banc* opinion of the Court of Appeals, not yet reported, appears in the appendix hereto at A1.¹ The District Court decision is included as an appendix to the decision of the Circuit Court and is also printed as part of the appendix to this petition at A57. The unanimous panel decision of the Circuit Court, which four judges of the *en banc* Court reversed, is reported at 517 F.2d 137 (1975) and is included in the appendix at A169.

JURISDICTION

The *en banc* judgment of the Court of Appeals was entered on February 23, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a district court enforcing Federal Trade Commission subpoenas has jurisdiction to determine issues of relevancy, burden and confidentiality, and to modify subpoenas accordingly.

2. Whether, in a subpoena enforcement proceeding, district court findings respecting the scope of a Federal Trade Commission investigation, based on representations to the court by the Federal Trade Commission, are factual in nature and hence subject to review only for clear error or abuse of discretion.

3. Whether a district court enforcing Federal Trade Commission subpoenas has discretion to narrow their

¹ The *en banc* Court consisted of six judges, of whom two dissented. The dissenting opinion is set forth at A69 in the joint appendix filed by all petitioners from the consolidated proceeding. The majority issued an order modifying its original opinion by adding a footnote thereto. See appendix at A165.

breadth with respect to factual issues recently considered and determined by the Federal Power Commission, in order to avoid unnecessary compliance burdens.

4. Whether the Federal Trade Commission in an investigation pursuant to § 5 of the Federal Trade Commission Act can be collaterally estopped with respect to factual issues recently subject to a final determination in a ratemaking proceeding of the Federal Power Commission.

STATUTE INVOLVED

This case involves enforcement by the District Court of administrative subpoenas *duces tecum* issued by the Federal Trade Commission. 15 U.S.C. § 49 (1970) provides in relevant part:

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

STATEMENT OF THE CASE

Background

The subpoenas here in question were directed to certain natural gas producers including Petitioner in an investigation of possible violations of § 5 of the Federal Trade Commission Act.² The FTC investigation arose out of allegations that natural gas producers were un-

² The subpoena text is reproduced in the appendix at A46.

der-reporting proved reserves of natural gas in Southern Louisiana through the American Gas Association (AGA). Since 1946 producers have reported to the AGA individual proved reserves, and the AGA has provided industry, government and the public with annual estimates of proved reserves of natural gas and natural gas liquids in the United States. In 1969 the AGA reported the first annual decline of natural gas reserves in the United States. That decline was one of the earliest harbingers of the present energy crisis and elicited widespread concern. It was asserted in Congress that the reported decline in proved reserves did not accurately represent the availability of natural gas in this country, but was instead the result of alleged collusive reporting by natural gas producers, upon whose reports the AGA estimates are based. The FTC investigation pursuant to which the instant subpoenas were issued was undertaken in response to that assertion.³

The Federal Power Commission

As part of its statutory responsibility to regulate gas prices, the Federal Power Commission had, just prior to the AGA's 1969 report, concluded a proceeding to establish area-wide rates for Southern Louisiana, the largest natural gas producing area in the United States (So La I).⁴ Because of the growing shortage of natural gas the FPC, almost immediately after that proceeding, commenced a second proceeding to reconsider rates for Southern Louisiana gas (So La II). The main purpose of the new investigation was to determine whether, in

³ See App. at A7.

⁴ *Area Rate Proceeding (Southern Louisiana)*, 40 FPC 530 (1968), modified on rehearing, 41 FPC 301 (1969), *aff'd sub nom. Austral Oil Co. v. FPC*, 428 F.2d 407 (5th Cir.), cert. denied, 400 U.S. 950 (1970), *aff'd per curiam*, 444 F.2d 125 (5th Cir. 1970).

light of the diminishing supply, higher area rates were required. In response to the contention of a party to the FPC proceeding that the shortage was illusory because of alleged manipulations of AGA data, the FPC investigation considered the reliability of AGA data and the producers' reports. The FPC's proceeding was adversarial in nature and testimony was subject to cross examination. In its investigation, the FPC ordered the producers to complete special questionnaires concerning reserves. The completed questionnaires were subject to a staff audit. The FPC concluded its proceeding in July, 1971. It rejected the false-reporting charge and found that AGA estimates were an adequate basis for ratemaking. That decision was affirmed by the Fifth Circuit and this Court.⁵

Subsequently, the FPC undertook, at the direction of Congress, a comprehensive independent survey of natural gas reserves which did not rely on the AGA figures at any point. The final report issued in May 1973 concluded that the AGA estimates of reserves were, if anything, too high.⁶

The Federal Trade Commission

In late 1970 the FTC initiated its investigation into the reporting of natural gas reserves in Southern Louisiana. From the beginning of the investigation the AGA cooperated voluntarily. Substantial quantities of data and documents were produced from company and AGA files, including the field-by-field esti-

⁵ *Area Rate Proceeding Offshore Southern Louisiana*, 46 FPC 84, 114-16 (1971), *aff'd sub nom. Placid Oil Co. v. FPC*, 483 F.2d 880 (5th Cir. 1973), *aff'd sub nom. Mobil Oil Corp. v. FPC*, 417 U.S. 283 (1974).

⁶ FPC Staff Report on National Gas Reserves Study (May 1973). See App. at A87.

mates of proved reserves made by each Southern Louisiana subcommittee member in 1966 through 1970. Members of the AGA subcommittee voluntarily gave depositions. See App. at A8-9, A72.

On June 3, 1971, the FTC issued a resolution authorizing compulsory process, and on November 24, 1971—after the FPC had concluded its proceeding in *So La II*—the FTC staff issued the instant subpoenas to eleven natural gas producers including Petitioner. The exceedingly broad subpoenas sought massive quantities of proprietary technical data and estimates of every type respecting natural gas reserves including, but by no means limited to, the producers' "treasure maps". All producers promptly moved to quash. The Commission denied the producers' motions on June 27, 1972.⁷

The District Court

As authorized by § 9 of the Federal Trade Commission Act, petitions for enforcement of the subpoenas were filed in the District Court on June 4, 1973. A hearing on preliminary motions was held on July 30, 1973. After briefing and submission of evidentiary materials by the producers and the FTC, a full hearing on the issues was held on December 13, 1973. The District Court issued an order on March 22, 1974, enforcing six of the subpoenas' twelve specifications in full, and six in part. The order upheld the FTC's right to conduct an investigation, but noted the contentions of Petitioner and other producers that compliance with the subpoenas as issued would be needlessly burdensome and irrelevant to any proper subject of investigation. The order further took account of the fact that the FPC had already investigated the

⁷ App. at A258. Subsequently, three of the eleven complied with modified subpoenas. *Id.* at A10-11.

accuracy of the natural gas reserve estimates and found them reliable. Accordingly, the District Court approved the subpoenas with modifications:

(a) Compliance was ordered respecting documents concerning *proved* reserves, the only estimates reported by the AGA, thus eliminating highly speculative and commercially sensitive data concerning unproved deposits.

(b) Initial compliance was ordered respecting 100 fields to be selected at random from the approximately 225 fields subject to the original subpoenas.

(c) Compliance was ordered respecting the years 1969-1971.

(d) Certain specifications were limited to the off-shore area.

(e) Confidentiality protections were ordered and the companies were permitted to produce documents where stored.

The District Court specifically retained authority to grant the FTC further discovery.

The Circuit Court

The FTC did not avail itself of any of the relief it obtained from the District Court, but instead appealed those portions of the District Court's order limiting the subpoenas. On August 8, 1975, a three judge panel unanimously upheld the District Court's order in all respects except the provision limiting production to the years 1969-1971 which was extended to the full period sought by the FTC.⁸ At that point, the FTC, still not proceeding with either the discovery the Dis-

⁸ The panel included Circuit Judges Wilkey and MacKinnon and District Judge Jameson, the latter sitting by designation pursuant to 28 U.S.C. § 294(d).

trict Court permitted or the additional discovery permitted by the panel, petitioned for and received rehearing *en banc*. A four-judge majority of the *en banc* Court, two judges dissenting,⁹ upheld the subpoenas as issued, with two exceptions (concerning raw field data and the suspected locations of natural gas in currently unleased acreage), the exceptions having been previously proposed by the FTC for settlement purposes. Also, notwithstanding that the issue was not before it, the *en banc* Court reduced by half the time provided by the District Court for compliance.

REASONS FOR GRANTING WRIT

1. **Contrary to This Court's Decisions, the Circuit Court Has Removed Any Authority in the Courts To Modify Administrative Subpoenas for Burden or Relevance or To Protect Confidentiality.**

The standard of review of administrative subpoenas applied by the Circuit Court effectively removes any authority in the courts to modify administrative subpoenas and reduces the courts to rubber stamps of administrative action. Although administrative agencies have broad powers to issue subpoenas, *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), those powers are not unlimited:

It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose and specific in directive so that compliance will

⁹ The majority opinion of Judge Bazelon was joined by Judges Wright, Leventhal and Robinson. Judge Wilkey dissented joined by Judge MacKinnon. Judges McGowan, Tamm and Robb recused themselves.

not be unreasonably burdensome. *See v. Seattle*, 387 U.S. 541, 544 (1967).

It is the duty of the district court to which enforcement of administrative subpoenas is entrusted to examine those subpoenas and to keep them from being oppressive dragnets. *See, e.g., See v. Seattle, supra* at 544 (1967); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208-09 (1946); *Chapman v. Maren Elwood College*, 225 F.2d 230, 234 (9th Cir. 1954). That is precisely what the District Court did in this case. After receiving extensive submissions from all parties and holding two days of hearings in which the FTC stated the actual scope of its investigation, the District Court enforced the subpoenas modified to delete irrelevant and oppressive portions.

The four judges of the *en banc* majority, on the other hand, failed to make any factual investigation of relevance or burden, although they substituted their judgment on those issues for the District Court's. The only modifications which the Circuit Court adopted are those the agency itself proposed in settlement negotiations. App. at A44. With respect to burden, as discussed below, the majority simply asserted that the courts may not even take into account duplicative and overlapping investigations of sister agencies.

The extent to which the majority rubber stamped the FTC is illustrated by its response to the FTC's request for modification of the Court's opinion. On the FTC's motion, the majority modified its opinion to provide that the confidentiality provisions in this case have no precedential value. See App. at A165-66. The majority's complete deference to the FTC denies effective judicial review and thus precludes the protections which this Court has always held available to persons subject to subpoenas.

2. The Decision Below Alters the Established Standard of Review of District Court Decisions Respecting Administrative Subpoenas by Allowing the Reviewing Court to Reverse the District Court on Fact Issues Without Any Finding of Abuse of Discretion or Clear Error.

The *en banc* majority's decision sharply alters the historic roles of the trial court and the reviewing court in the enforcement of administrative subpoenas. If left standing, the decision would permit a circuit court simply to substitute its view for that of the trial court whenever questions of relevance or oppressiveness are raised.¹⁰

Determinations of relevance and burden are, of course, matters committed to the discretion of the district court and are not to be overturned without a finding of abuse of discretion or clear error. *See, e.g., United States v. Nixon*, 418 U.S. 683, 702 (1974); *FTC v. Lonning*, 539 F.2d 202, 211 (D.C. Cir. 1976). Except as to the District Court's limitation of the subpoenas to the years 1969-71, no reviewing judge has made any such finding in this case.¹¹ Rather, the majority avoided the established rule by finding that the District Court too narrowly conceived the scope of the FTC's investigation, a finding which the majority mischaracterized as a question of law. *See* App. at A22, A25 n.29. Having placed the District Court's findings of relevancy and burden in that context, the

¹⁰ This Court recently has in other cases had to exercise its supervisory powers over this circuit because the Circuit Court improperly substituted its judgment on review. *NLRB v. Pipefitters*, 45 U.S.L.W. 4144, 4150 (Feb. 22, 1977); *FPC v. Transcontinental Gas Pipeline Corp.*, 423 U.S. 326, 331 (1976).

¹¹ The sufficiency of the District Court's findings is discussed at length in the dissenting opinion. App. at A93-134.

majority then simply substituted its own view of the facts for that of the District Court as to the proper scope of the subpoenas.

The majority violated the elementary principle that the scope of an agency investigation and determinations of relevance of process pursuant to it are inherently tied together; the question of relevance cannot be separated from the district court's factual investigation of the agency's intended scope of investigation. *See Montship Lines Ltd. v. Federal Maritime Bd.*, 295 F.2d 147, 155 (D.C. Cir. 1961); *Hellenic Lines, Ltd. v. Federal Maritime Bd.*, 295 F.2d 138, 140 (D.C. Cir. 1961); *FTC v. Green*, 252 F. Supp. 153 (S.D.N.Y. 1966). To assess relevance it is essential to know the purpose of the investigation. *Id.* Absent such comparison, the concept of relevance would be meaningless.

The FTC resolution establishing an investigation and authorizing the subpoenas in question is extremely vague and overbroad and would on its face have permitted the FTC to require the production of virtually every document in Petitioners' possession.¹² It is in just this type of case that the role of the district court in determining the permissible scope of administrative subpoenas is vital. District courts have enforced subpoenas pursuant to very broad agency resolutions, but only where the courts found a narrower focus of investigation which justified enforcement of the issued subpoenas. *See, e.g., FTC v. Green, supra*, where the court upheld an administrative subpoena issued to a broad resolution only after finding:

[I]t is evident from the nature of the data here sought that the Commission is investigating

¹² *See* App. at A287.

whether Standard Brands or other manufacturers are selling below cost or otherwise engaging in price discrimination not justified by costs. *Id.* at 156.

Before making its findings of relevance the District Court carefully inquired of FTC counsel regarding the actual scope of the FTC's investigation. FTC counsel responded as follows:

[FTC COUNSEL]: . . . [W]hat we are investigating is possible collusive conduct by the natural gas producers in the reporting of these reserves.

.

[FTC COUNSEL]: . . . What we want to find out is whether or not in reporting natural gas reserves there has been collusive conduct in the way these estimates are prepared.

THE COURT: Reporting them to whom.

[FTC COUNSEL]: All right. Reporting them to the American Gas Association, because the American Gas Association data is the only available published data on these reserves. App. at A95-96.

These statements are binding on the FTC, *see United States v. Star Construction Co.*, 186 F.2d 666, 669 (10th Cir. 1951), but even if they were not binding, FTC counsel's representations are unquestionably a proper element for consideration in the District Court's fact finding. Partly on the basis of these representations, the District Court enforced the subpoenas with limitations. Without the limiting explanations of counsel, the Court might well have had to refuse enforcement altogether. *See Montship Lines Ltd. v. Federal Maritime Bd.*, 295 F.2d 147, 155 (D.C.

Cir. 1961); *FTC v. Green*, 252 F. Supp. 153 (S.D.N.Y. 1966).

The Circuit Court decision subverts the historic allocation of responsibility between trial and appellate courts. If investigative subpoenas are to be promptly enforced and agency investigations are to go forward expeditiously, it is essential that trial courts be permitted to resolve inherently factual disputes. To allow appellate courts to substitute their judgment on the issues of relevancy and burden would greatly erode the district courts' authority, contribute to delay and frustrate enforcement, as the instant case illustrates. The District Court's order herein was issued more than three years ago. Instead of proceeding under that order, obtaining most of what was originally sought, and returning for additional discovery as the District Court expressly permitted,¹³ the FTC stayed its investigation while seeking time-consuming appellate review. The majority's apparent endorsement of the FTC's dilatory approach invites needless appeals and requires extensive and duplicative appellate inquiry into factual matters determined below. Reaffirmation by this Court of the proper scope of review in this case would discourage such delays and needless burdens on already clogged appellate courts.

The error in the majority's whole approach is well summarized in the words of the dissent:

The majority has engaged in a standardless, directionless review in this case, and no euphemism can disguise this embarrassing fact. The majority opinion demonstrates this assertion by failing to even define the purpose of the FTC in-

¹³ See App. at A61.

vestigation which is being subjected to de novo review, although the trial court had elucidated this quite well from FTC counsel. . . . The failure to focus on the FTC's purpose in turn causes the majority to roam into those areas committed by precedent to, and more appropriate for, the district court. . . .

The enlarged role which the majority has assigned to this court in this case distorts the proper relationship between the federal agencies, the federal trial courts, and the federal appellate courts. In so doing, the majority sets a pernicious precedent for future trials *de novo* which would leave the Court of Appeals as the primary determinant of factual matters more properly suited for the District Court.

The strength of this sloppy precedent is, of course, weakened by the composition of the *en banc* court in this case; here the majority consists of only four of our colleagues. It is our hope that the approach adopted by this diminished majority of the court will not be carried over into future cases. If it is attempted to be so applied in the future, it will be a divergence from accepted practice of such magnitude that a close examination by our full court will be warranted, if the errors of our four colleagues have not already received their just reward from an even higher authority. App. at A163-64.

3. The Circuit Court Decision Eliminates Any Authority in the District Court To Limit the Burden of Administrative Subpoenas Resulting From Duplicative Investigations by Sister Federal Agencies.

The *en banc* majority not only rejected any preclusive effect of the FPC fact determination, but even prohibited the District Court from taking into account the FPC's findings in determining whether the FTC

subpoenas were oppressive. The effect of that decision is to deprive the district courts of all authority to coordinate or limit administrative subpoenas where jurisdictional or investigative overlaps occur.

The proliferation of repetitive demands is clearly a proper factor to be considered in assessing the burden of administrative subpoenas. See *Application of Consumer's Union of United States, Inc.*, 27 F.R.D. 251, 254 (S.D.N.Y. 1961). Yet the majority's position appears to be that the repetitive and cumulative nature of subpoenas should be ignored when it is the result of demands of multiple Government agencies. See App. at A38-40.

Judicial discretion to avoid the whipsaw effect of repetitive demands of multiple Federal agencies is particularly needed where Federal agencies conduct overlapping investigations. Obviously, agencies have different statutory responsibilities and must be allowed to carry out the duties which Congress assigned them. That point was carefully observed by the District Court, which specifically found "that the Trade Commission is authorized to pursue the investigation to determine whether there exists any evidence of conspiracy . . ." App. at A57. At the same time, no Federal agency is a sovereign unto itself. Each is part of the United States Government; where one has authority to bind the United States, all will be bound. See *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 10 (1972); *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940). This principle requires that district courts have discretion to determine whether repetitive agency demands are needlessly burdensome.

District court discretion is particularly vital where, as here, sister agencies of the Government become involved in "competitive" activity. If the Circuit Court's decision stands, district courts will be powerless to ameliorate the effects of identical demands of a "competing" agency. Without judicial control this quickly leads to a situation in which no response to an agency is ever sufficient because of the appetite of "competing" agencies to reexamine the matter to show the inadequacy of the other agency's efforts.

To avoid that unseemly and prejudicial effect, this Court should affirm the view of the Circuit Court's dissenters which would

leave it to the sound discretion of the district courts to determine whether the effort and expense involved in responding to repetitive agency demands imposes an unfair and unreasonable burden on the responding parties. Being another essential factual determination, this has always been, and should remain, the province of the district courts. App. at A130.

4. The Decision of the Court Below to the Extent It Determines the Issue of Collateral Estoppel Resolves an Important Point of Law in Conflict with Decisions of This Court and Other Circuits.

Petitioner has urged in these proceedings that collateral estoppel is not an issue which needs to be addressed in this case, and that the decision of the District Court is fully sustainable as an exercise of its discretion. Nevertheless, the *en banc* Court asked counsel for argument on the question of collateral estoppel. The majority found that collateral estoppel could not be raised at this stage, thus denying petitioners the beneficial

effects which collateral estoppel is supposed to have. App. at A34-36. Judge Leventhal, concurring, went even further, stating that "the whole doctrine of preclusive effect whether cast as collateral estoppel or res judicata is inapplicable to the conclusion of an agency exercising such a legislative function as ratemaking." App. at A-65. The dissenting judges took the contrary position and relied on collateral estoppel as an alternative independent ground for sustaining the District Court decision. App. at A134-58.

Having addressed the issue and having declined to give preclusive effect to the relevant FPC fact determinations, the Circuit Court determined an important question of law in conflict with decisions of this Court and other Circuits. See *United States v. Utah Construction Co.*, 384 U.S. 394, 421-22 (1966); *Safir v. Gibson*, 432, F.2d 137 (2d Cir. 1970) (Friendly, J.), *cert. denied*, 400 U.S. 942 (1970); *United States v. Willard Tablet Co.*, 141 F.2d 141 (7th Cir. 1944); *George H. Lee Co. v. FTC*, 113 F.2d 583 (8th Cir. 1940). The defects of that position and its adverse consequences are well set out in the dissenting opinion of the Circuit Court. App. at A134-58. See also the accompanying Petition of Exxon Corp., et al., for Certiorari.

CONCLUSION

For the reasons stated in the dissent of Judges Wilkey and MacKinnon, and herein, a writ of certiorari should issue in this case.

Respectfully submitted,

LEE LOEVINGER

MARTIN MICHAELSON

JOSEPH C. BELL

815 Connecticut Ave., N.W.

Washington, D.C. 20006

(202) 331-4500

Attorneys for Petitioner

*Standard Oil Company of
California*

Of Counsel:

HOGAN & HARTSON

815 Connecticut Ave., N.W.

Washington, D.C. 20006

April 15, 1977